(5)

No. 04-621

In the Supreme Court of the United States

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, PETITIONER

v.

DYNEGY POWER MARKETING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

EDWIN S. KNEEDLER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CYNTHIA A. MARLETTE
General Counsel

DENNIS LANE
Solicitor

LONA T. PERRY
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426-0002

QUESTION PRESENTED

Whether the district court and the court of appeals correctly held that federal law precluded petitioner's claims that respondents acted in violation of state antitrust and unfair competition laws in setting wholesale power rates subject to the jurisdiction of the Federal Energy Regulatory Commission.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 9

A. Petitioner's attacks on the validity of FERC's market-based regulations are not before the Court 9

B. The court of appeals' conclusion is compelled by FERC's exclusive jurisdiction over wholesale sales by public utilities, including their wholesale rates and tariffs 13

Conclusion 20

TABLE OF AUTHORITIES

Cases:

American Elec. Power Serv. Corp., 103 F.E.R.C. ¶ 61,345 (2003), reh'g denied, 106 F.E.R.C. ¶ 61,020 (2004), appeals pending *sub nom. Dynegy Power Mktg., Inc.* v. *FERC*, No. 04-1306 (D.C. Cir.) 6

Arkansas La. Gas Co. v. *Hall*, 453 U.S. 571 (1981) 16

Branch v. *Smith*, 538 U.S. 254 (2003) 19

Cajun Elec. Power Coop., Inc. v. *FERC*, 28 F.3d 173 (D.C. Cir. 1994) 13

California Power Exch. Corp., In re, 245 F.3d 1110 (9th Cir. 2001) 4

Cases—Continued: Page

California ex rel. Lockyer v. *British Columbia Power Exch.*, 99 F.E.R.C. ¶ 61,295, on reh'g, 100 F.E.R.C. ¶ 61,296 (2002), aff'd in relevant part, 383 F.3d 1006 (9th Cir. 2004) 12, 13

California ex rel. Lockyer v. *FERC*, 383 F.3d 1006 (9th Cir.), petition for reh'g en banc pending (filed Oct. 25, 2004) 12

Duquesne Light Co. v. *Barasch*, 488 U.S. 299 (1989) . 12

Elizabethtown Gas Co. v. *FERC*, 10 F.3d 866 (D.C. Cir. 1993) 13

FPC v. *Southern Cal. Edison*, 376 U.S. 205 (1964) . 14, 15

Fact-Finding Investigation into Possible Manipulation of Elec. & Natural Gas Prices, 102 F.E.R.C. ¶ 61,108 (2003), reh'g dismissed, 104 F.E.R.C. ¶ 61,146 (2003), appeals pending *sub nom. Pacific Gas & Elec. Co.* v. *FERC*, No. 03-72874 (9th Cir.) 6

Fact-Finding Investigation of Potential Manipulation of Elec. & Natural Gas Prices, 98 F.E.R.C. ¶ 61,165 (2002) 5

Florida Mun. Power Agency v. *Florida Power & Light Co.*, 64 F.3d 614 (11th Cir. 1995) 19, 20

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 18

Investigation of Anomalous Bidding Behavior and Practices in the Western Markets, 103 F.E.R.C. ¶ 61,347 (2003), reh'g denied, 106 F.E.R.C. ¶ 61,057 (2004), appeal pending *sub nom. City of Los Angeles Dep't of Water & Power* v. *FERC*, No. 04-1081 (D.C. Cir.) 6

Cases—Continued: Page

Louisiana Energy & Power Auth. v. *FERC*, 141 F.3d 364 (D.C. Cir. 1998) 13
MCI Telecomms. Corp. v. *AT&T*, 512 U.S. 218 (1994) 10
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990) 10
Mirant Corp., In re, 378 F.3d 511 (5th Cir. 2004) 18
Mississippi Power & Light Co. v. *Mississippi*, 487 U.S. 373 (1988) 11, 15
Montana-Dakota Utils. Co. v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951) 16
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953 (1986) 14
New England Power Co. v. *New Hampshire*, 455 U.S. 331 (1982) 13
New York v. *FERC*, 535 U.S. 1 (2002) 14
Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 18
Pacific Gas & Elec. Co., 81 F.E.R.C. ¶ 61,122 (1997) 3
Posadas v. *National City Bank*, 296 U.S. 497 (1936) 19
Public Util. Comm'n v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) 13
Public Util. Dist. No. 1 v. *Idacorp.*, 379 F.3d 641 (9th Cir. 2004) 9, 16
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) . 15
San Diego Gas & Elec. Co. v. *Sellers of Energy & Ancillary Servs.*:
93 F.E.R.C. ¶ 61,121 (2000) 3, 4

Cases—Continued: Page

93 F.E.R.C. ¶ 61,294 (2000) mandamus denied, 245 F.3d 1110 (9th Cir. 2001) 4
95 F.E.R.C. ¶ 61,418 (2001) 4
96 F.E.R.C. ¶ 61,120 (2001) 4
101 F.E.R.C. ¶ 63,026 (2002) 5
102 F.E.RC. ¶ 61,317 (2003) 5
105 F.E.R.C. ¶ 61,066 (2003) 5
107 F.E.R.C. ¶ 61,165 (2004) 5
108 F.E.R.C. ¶ 61,002 (2004) 6
109 F.E.R.C. (2004):
¶ 61,071 6
¶ 61,218 5
¶ 61,257 6
110 F.ER.C. ¶ 61,336 (2005) 5
111 F.E.RC. ¶ 61,017 (2005) 6
Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) 17
Tejas Power Corp. v. *FERC*, 908 F.2d 998 (D.C. Cir. 1990) 13
United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) 17

Statutes and regulation:

Federal Power Act, 16 U.S.C. 791a *et seq.* 1
16 U.S.C. 824d(a) 1
16 U.S.C. 824d(b) 1
16 U.S.C. 824d(c) 10, 12
16 U.S.C. 824d(e) 1
16 U.S.C. 824e(a) 2

Statutes and regulation—Continued: Page

16 U.S.C. 824e(b) 2, 4

16 U.S.C. 825d(a) 12

16 U.S.C. 825d(c) 12

16 U.S.C. 825*l*(b) 11

California Cartwright Act, Cal. Bus. & Prof. Code §§ 16720 *et seq.* (West 1997) 7

California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* (West 1997) 7

18 C.F.R. 35.13 2

Miscellaneous:

FERC, *Final Report on Price Manipulation in Western Markets, No. PA 02-2-000* (Mar. 2003) 6

In the Supreme Court of the United States

No. 04-621

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, PETITIONER

v.

DYNEGY POWER MARKETING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Acting Solicitor General to express the views of the United States. In the view of the United States, the decision below is correct and does not merit the Court's review.

STATEMENT

1. Under the Federal Power Act (FPA), 16 U.S.C. 791a, *et seq.*, all proposed rates, terms, and conditions for or in connection with the transmission and sale at wholesale of electric energy in interstate commerce must be "just and reasonable," 16 U.S.C. 824d(a), and not unduly discriminatory or preferential. 16 U.S.C. 824d(b). A complaint asserting that existing rates are unlawful is filed with the Federal Energy Regulatory Commission (FERC), which has the authority to investigate the complaint. 16 U.S.C. 824d(e). If, after a hearing on its own motion or on complaint, FERC determines that any existing rate or charge is

unjust or unreasonable, it must determine and fix by order the just and reasonable rate or charge "to be thereafter observed and in force." 16 U.S.C. 824e(a). FERC "may order the [seller] to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate." 16 U.S.C. 824e(b).

2. Before 1996, electricity rates in California were cost-based. Power suppliers filed tariffs with FERC setting forth their wholesale rates and gave FERC a detailed explanation of how they were derived. See, *e.g.*, 18 C.F.R. 35.13 (filing requirements for rate changes). Once FERC approved the tariff, the utility would have to charge the filed rate until the submission and approval of a new tariff by FERC. Pet. App. 3a.

In 1996, California adopted legislation comprehensively restructuring the State's electric industry, and in turn FERC approved a new system of market-based rates for wholesale transactions arrived at through use of a structured market. Under the state legislation, California's three major investor-owned utilities were required to divest a substantial portion of their power generation plants and to sell the output of their remaining generation capacity to a newly created wholesale clearinghouse, known as the California Power Exchange (PX). See Pet. App. 102a-103a. The PX would operate an auction market for the purchase and sale of electricity in the "day-ahead" and "day-of" markets, and would set market-clearing prices applicable to all bids accepted by the PX. *Id.* at 4a.

The new legislation also created the California Independent System Operator (ISO) to manage the transmission network. As part of its network reliability responsibility, the ISO operated a real-time, or spot, market to balance supply and demand at precise points in time. Pet. App. 4a-5a.

3. On April 29, 1996, the three major investor-owned utilities filed applications with FERC seeking, *inter alia*, authority

to sell electric energy at wholesale at market-based rates. Pet. App. 103a-104a. In accordance with its established policy, FERC approved their requests for market-based rate authority after finding that the companies and their affiliates did not have, or had adequately mitigated, market power. See, *e.g.*, *Pacific Gas & Elec. Co.*,81 F.E.R.C. ¶ 61,122, at 61,437, 61,537, 61,572 (1997).

FERC had also reviewed and approved applications by other wholesale generators and suppliers that lacked, or had adequately mitigated, market power to sell electric energy at market-based rates, including in the California markets. In addition, the ISO and the PX filed comprehensive tariffs describing in detail how their markets would operate. FERC approved those tariffs, and FERC required each participant in the new markets to agree that the ISO and PX tariffs would govern all transactions in their markets. Pet. App. 7a-9a. The ISO and PX commenced operations in late March 1998. *Id.* at 104a.

4. In June 2000, California suffered an energy crisis that brought a sharp rise in wholesale electricity prices, frequent system emergencies along with occasional blackouts, and severe financial distress to California utilities, energy customers, and other market participants. See Pet. App. 2a, 104a-105a.

5. On July 26, 2000, FERC instituted a staff fact-finding investigation that identified three major factors contributing to the high spot market prices: (1) market fundamentals, such as significantly increased power production costs, increased demand due to unusually high temperatures, and a scarcity of available generation resources; (2) over-reliance on the spot markets as a result of the California Public Utilities Commission's requirement that the three investor-owned utilities buy and sell through the PX; and (3) the possible exercise of market power in the spot markets. *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 93 F.E.R.C. ¶ 61,121, at 61,354-61,355, 61,359 (2000).

The confluence of those factors caused unjust and unreasonable rates for short-term energy under certain conditions. *San Diego Gas & Elec.*, 93 F.E.R.C. ¶ 61,121, at 61,349-61,350. To remedy the situation, FERC implemented structural and pricing reforms to make California and Western electricity markets more stable and less susceptible to unreasonable price spikes, including eliminating the requirement that investor-owned utilities buy and sell through the PX. See, *e.g.*, *In re California Power Exch. Corp.*, 245 F.3d 1110, 1114-1116 (9th Cir. 2001); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 93 F.E.R.C. ¶ 61,294, at 61,195 (2000), mandamus denied, 245 F.3d 1110 (9th Cir. 2001); see also Pet. App. 105a. After the adoption of those measures, by late June 2001, prices in California spot and forward markets fell back to preexisting competitive levels. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 95 F.E.R.C. ¶ 61,418, at 62,546 (2001).

6. FERC also initiated an evidentiary hearing in FERC Docket Nos. EL00-95 *et al.* (the Refund Proceeding) to determine refunds owed by suppliers in the California spot markets for sales at unjust and unreasonable rates. See generally *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 96 F.E.R.C. ¶ 61,120 (2001). The Federal Power Act establishes the earliest refund date as 60 days following the filing of a complaint. 16 U.S.C. 824e(b). Applying that rule, FERC set the earliest date for refunds as October 2, 2000. 96 F.E.R.C. ¶ 61,120, at 61,504. FERC set the termination date for refunds as June 20, 2001. *Id.* at 61,499. While FERC has authority under the FPA to direct additional remedies (including the disgorgement of profits) for tariff violations occurring during any time period, no violation of sellers' market-based tariffs had yet been demonstrated at the time the Refund Proceeding was initiated, and no additional remedies were accordingly adopted in that proceeding. See, *e.g.*, *id.* at 61,507-61,508.

FERC determined in the Refund Proceeding that customers are entitled to refunds of more than $1 billion. *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 101 F.E.R.C. ¶ 63,026 (2002). Subsequent orders have clarified the methodology used for calculating refunds, and have instructed the ISO and PX to recalculate bills for all sales during the refund period. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 110 F.E.R.C. ¶ 61,336 (2005); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 109 F.E.R.C. ¶ 61,218 (2004); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 107 F.E.R.C. ¶ 61,165 (2004); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 105 F.E.R.C. ¶ 61,066 (2003); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 102 F.E.R.C. ¶ 61,317 (2003). (Petitions for review from refund proceeding orders have generally been consolidated in the Ninth Circuit, with the lead docket captioned *Public Utilities Commission* v. *FERC*, No. 01-71051.) When those recalculations are finalized, FERC will order final refunds and close the Refund Proceeding.

7. After uncovering evidence that Enron, one of the participants in the California market, had engaged in various market manipulation strategies, FERC initiated a separate, broad-based investigation into whether any entity manipulated short-term prices in Western energy markets during the time period commencing January 1, 2000. See *Fact-Finding Investigation of Potential Manipulation of Elec. & Natural Gas Prices*, 98 F.E.R.C. ¶ 61,165 (2002). FERC staff obtained voluminous electronic data, written materials, and data responses from all segments of the industry, as well as ISO and PX bidding data and expert testimony and analyses.

The Final Report prepared by FERC's staff concluded, *inter alia*, that the filed tariffs of the ISO and PX prohibited certain abuses of market power impairing the efficient operations of the ISO and PX markets, and the Report identified instances of al-

leged market power abuses and tariff violations. See FERC, *Final Report on Price Manipulation in Western Markets, No. PA 02-2-000* (Mar. 2003). FERC initiated a number of proceedings to examine instances of potential wrongdoing and to take remedial action as appropriate, even if the wrongdoing occurred before October 2, 2000. See *American Elec. Power Serv. Corp.*, 103 F.E.R.C. ¶ 61,345 (2003), reh'g denied, 106 F.E.R.C. ¶ 61,020 (2004), appeals pending *sub nom. Dynegy Power Mktg., Inc.*, v. *FERC*, No. 04-1036 (D.C. Cir.); *Investigation of Anomalous Bidding Behavior & Practices in the Western Markets*, 103 F.E.R.C. ¶ 61,347 (2003), reh'g denied, 106 F.E.R.C. ¶ 61,057 (2004), appeal pending *sub nom. City of Los Angeles Dep't of Water & Power* v. *FERC*, No. 04-1081 (D.C. Cir.).

In addition to the refunds ordered in the Refund Proceeding, the separate investigations of alleged misconduct constituting violations of FERC-filed tariffs have begun to result in settlements that provide additional relief for ratepayers. See, *e.g.*, *Fact-Finding Investigation into Possible Manipulation of Elec. & Natural Gas Prices*, 102 F.E.R.C. ¶ 61,108 (2003), reh'g dismissed, 104 F.E.R.C. ¶ 61,146 (2003) (agreement to pay $13.8 million for withholding of generating capacity on two days in June 2000), appeals pending *sub nom. Pacific Gas & Elec. Co.* v. *FERC*, No. 03-72874 (9th Cir.); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 109 F.E.R.C. ¶ 61,257 (2004) (approximately $200 million to resolve all claims against Duke Energy); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 109 F.E.R.C. ¶ 61,071 (2004) (almost $300 million to resolve all claims against Dynegy, Inc. and NRG Energy); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.* 108 F.E.R.C. ¶ 61,002 (2004) (approximately $140 million in resolution of FERC claims). In April 2005, FERC approved a settlement valued at more than $320 million of claims against Mirant Corp., one of the participants in the California market and a respondent in this case. See *San Diego Gas &*

Elec. Co. v. *Sellers of Energy & Ancillary Servs.*, 111 F.E.R.C. ¶ 61,017 (2005).

8. Petitioner, a utility serving a part of the State of Washington, filed a complaint in the United States District Court for the Central District of California against generators and traders who sold power in the California wholesale market, alleging the market manipulation and tariff violations that were the subject of FERC's investigation described above. Pet. App. 5a-6a. Petitioner alleged that "these practices caused [petitioner] 'to pay prices for electricity in excess of rates that would have been achieved in a competitive market.'" *Id.* at 6a. Petitioner sought injunctive relief and damages under the California Cartwright Act, Cal. Bus. & Prof. Code. §§ 16720 *et seq.* (West 1997) (California's antitrust law) and the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* (West 1997). Pet. App. 5a-6a.

9. The case was transferred to the Southern District of California. The district court held that petitioner's claims were barred by the filed rate doctrine, which precludes courts from setting or assuming a rate different from that approved by FERC. Pet. App. 20a-22a. The court explained that petitioner "specifically seeks as redress the difference between the charged rates and the different, hypothetical rates it believes would have 'been achieved in a competitive market.'" *Id.* at 20a. The court concluded that petitioner's claims were barred, because "in order to resolve [petitioner's] claims and provide the damages it seeks, the Court would be expressly required to assume 'a hypoethetical rate different from that actually set by FERC.'" *Ibid.* The district court also rejected petitioner's contention that the filed rate doctrine is inapplicable to market-based regulation, explaining that petitioner mischaracterized the nature and extent of FERC's oversight through the terms, formulas, and conditions of the PX and ISO tariffs. *Id.* at 23a-25a.

The district court also concluded that petitioner's claims were preempted, because "monetary relief to reduce past rates, and injunctive relief to regulate future conduct in the wholesale electricity market * * * cannot be granted without interfering with exclusive federal authority over wholesale power transactions." Pet. App. 26a. The court held that petitioner's claims were barred by field preemption because FERC has exclusive jurisdiction "over the regulation of interstate wholesale energy rates." *Id.* at 29a. The court also held that petitioner's "state law claims that seek repayment of wholesale rates found to be excessive under state law standards would inevitably conflict with FERC's exclusive jurisdiction to determine interstate wholesale rates." *Id.* at 31a. Especially in light of the ongoing proceedings before FERC, the District Court concluded "that any additional or different relief ordered by th[e] court would necessarily obstruct and frustrate FERC's proper regulatory efforts." *Id.* at 32a.

10. The court of appeals affirmed. Pet. App. 1a-11a. The court rejected petitioner's contention that preemption doctrines "should not apply when market-based rates are involved, because the market, and not FERC, is determining the rates." *Id.* at 7a. The court noted that FERC still "is doing enough regulation to justify federal preemption of state laws." *Ibid.* The court explained that, although market-based rates were in use in the California market, FERC continued to oversee wholesale electricity rates by reviewing and approving sellers' umbrella tariffs permitting sales at market-based rates, *ibid.*, requiring each seller to file quarterly reports regarding sales transactions, reviewing and approving the ISO and PX tariffs, *id.* at 8a, and, following the crisis, ordering disgorgement of profits resulting from the tariff violations alleged by petitioner, *id.* at 9a.

The court of appeals noted that it had previously concluded that, despite the fact that market-based rates were being used in the California market, state-law contract claims against an electricity wholesaler for rescission and restitution based on facts

similar to those alleged by petitioner here were preempted. Pet. App. 9a (citing *Public Util. Dist. No. 1* v. *Idacorp.*, 379 F.3d 641 (9th Cir. 2004) (*Grays Harbor*)). The court held that petitioner's claims "also ask the district court to determine the rates that 'would have been achieved in a competitive market'" and that they therefore "are barred by the filed rate doctrine, by field preemption, and by conflict preemption." *Id.* at 10a (quoting petitioner's complaint). The court held that petitioner's claim for injunctive relief is similarly barred, because it "encroach[es] upon the substantive provisions of the tariff, an area reserved exclusively to FERC, both to enforce and to seek remedy." *Id.* at 11a.

DISCUSSION

Insofar as petitioner attacks the validity of FERC's approval of market-based rates, such an attack must be presented in a petition for review of a FERC decision. It is not properly presented in determining a preemption issue in a private state-law suit in which FERC is not even a party. In any event, such an attack would be unsuccessful; decisions of the courts of appeals addressing similar attacks have uniformly concluded that FERC's approval of market-based rates does not violate the Federal Power Act. With respect to the issues that are presented in this case, the court of appeals correctly held that petitioner's state-law claims are preempted, because they are based on its complaints about rates charged in the interstate wholesale market for electricity, and it has long been settled that state law is ousted by FERC's jurisdiction over that field. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

A. Petitioner's Attacks On The Validity Of FERC's Market-Based Regulations Are Not Before The Court

1. As the court of appeals explained, although the precise prices at which electricity was to be sold in California were not

filed in advance, FERC did "continue[] to oversee wholesale electricity rates * * * by reviewing and approving a variety of documents filed by [respondents], the PX, and the ISO." Pet. App. 7a. FERC approved both the specific umbrella market-based rate tariffs of individual sellers and the tariffs of the ISO and PX, which contained market rules governing all sellers. The PX and ISO filings "described in detail how the markets operated by each entity would function" and "would govern all transactions in th[ose] market[s]," *id.* at 8a-9a; essentially, FERC approval of those tariffs, while not setting specific prices, set forth rules by which the specific prices would be determined.

Much of petitioner's argument depends on its contention that FERC's approval of the umbrella tariffs providing for market-based rates was invalid under the Federal Power Act, and that state law, which would otherwise be subject to preemption, can assume a role in that situation. For example, petitioner argues that, although the Federal Power Act requires that utilities "shall file * * * schedules showing all rates and charges for any transmission or sale," 16 U.S.C. 824d(c), "the market-based 'umbrella' tariffs utilized by FERC here constitute a blanket grant of authority to charge rates * * * that are not filed with, and reviewed by, FERC." Pet. 13. See *ibid.* (arguing that FERC's policy "deviates from the filing requirement" in violation of this Court's decision in *MCI Telecomms. Corp.* v. *AT&T*, 512 U.S. 218 (1994)); Pet. 27-28 ("Congress directed tight rate regulation, which was done by *ex ante* agency review and approval of rates or formulae from which rates could be ascertained * * *. But FERC's move to market-based tariffs abandoned the tightly regulated rate structure."); Reply Br. 4.[1]

---

[1] Petitioner's repeated citations (*e.g.*, Pet. 6, 11) to *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), similarly attempt to present the question whether FERC's approval of the market-based tariffs was legal. *Maislin* held that the Interstate Commerce Commission's attempt to enforce a negotiated rate that differed from the filed rate was inconsistent with the

This case does not present an appropriate vehicle for addressing petitioner's argument that FERC acted inconsistently with the Federal Power Act in permitting market-based rates in the California market. Petitioner could have sought review in a court of appeals under 16 U.S.C. 825*l*(b) of FERC's orders granting market-based rate authority to sellers in the Pacific Northwest markets, where petitioner was a buyer and in which petitioner operated. Or, if petitioner was an "aggrieved" party under Section 825*l*(b), it could have challenged the orders of FERC authorizing the market-based PX and ISO system in California (which petitioner claims was interconnected with and affected the prices in the market in which it operates). Petitioner, however, did neither.

Challenges to FERC orders under the Federal Power Act must be brought directly in the court of appeals, under Section 825*l*(b), not through a collateral attack in district court under state law, in which FERC is not a party and in which the administrative record on which FERC's orders must be judged is not before the court. Under the FPA, any party bringing a challenge to a FERC order must satisfy certain prerequisites (*e.g.*, presentation of its claim in a petition for rehearing before FERC), and the FPA provides expressly that the court of appeals "shall have jurisdiction, which upon the filing of the record with it *shall be exclusive*, to affirm, modify, or set aside such order in whole or in part." 16 U.S.C. 825*l*(b) (emphasis added). "The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts," because "[t]he only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Missis-*

---

governing statute. Petitioner's claims, by contrast, are based on an attack on the filed tariffs, and they would require a court to enforce a rate dictated by state antitrust law rather than a rate that resulted from those tariffs. *Maislin* thus supports the court of appeals' result here and provides no support for petitioner's claims.

sippi Power & Light Co. v. *Mississippi*, 487 U.S. 354, 375 (1988). Cf. *California ex rel. Lockyer* v. *FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004) (on petition for review of FERC order, rejecting challenge to FERC's acceptance of market-based tariffs as inconsistent with FPA), petition for reh'g en banc pending (filed Oct. 25, 2004). Petitioner therefore may not collaterally attack FERC's regulation of the wholesale electricity market in a private state-law action, such as this one.

2. In any event, FERC's approval of the market-based rates in California fully complied with the FPA. The FPA grants FERC broad discretion as to how the statute's ratemaking mandates will be satisfied. While 16 U.S.C. 825d(a) requires that "[a]ll rates and charges made * * * shall be just and reasonable," the FPA does not dictate, or even mention, a ratemaking methodology to be followed. See *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 315 (1989) (FERC not bound to use any particular rate methodology).

In addition, the requirement of 16 U.S.C. 824d(c) that every public utility file with FERC "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission" explicitly leaves the timing and form of those filings to FERC's discretion. "*Under such rules and regulations as the Commission may prescribe*, every public utility shall file with the Commission, *within such time and in such form as the Commission may designate*, * * * schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission." *Ibid.* (emphasis added). Under the tariff applicable here, the Commission requires sellers to file quarterly reports detailing for each individual purchase and sale the names of the parties, a description of the service, the delivery point of the service, the price charged and quantity provided, the contract duration, and any other attribute of the product being purchased or sold that contributed to its market value. *California ex rel. Lockyer* v. *British Columbia Power Exch.*, 99

F.E.R.C. ¶ 61,247, at 62,066 & n.44, on reh'g, 100 F.E.R.C. ¶ 61,295 (2002), aff'd in relevant part, 383 F.3d 1006, 1013-1014 (9th Cir. 2004).

Contrary to petitioner's assertions (Pet. 11-13), the courts of appeals have generally recognized that market-based rates are consistent with various requirements of the FPA and cognate statutes. "[W]hen there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result." *Elizabethtown Gas Co.* v. *FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); see also *Louisiana Energy & Power Auth.* v. *FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Cajun Elec. Power Coop., Inc.* v. *FERC*, 28 F.3d 173, 176, 179, 180 (D.C. Cir. 1994); *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990). "[I]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." *Lockyer*, 383 F.3d at 1013 (quoting *Tejas*, 908 F.2d at 1004); see *id.* at 1014 ("market-based tariffs do not, *per se*, violate the FPA"). No court of appeals has held that FERC's approval of a market-based system such as that in California is inconsistent with the FPA's mandates.

B. The Court of Appeals' Conclusion Is Compelled By FERC's Exclusive Jurisdiction Over Wholesale Sales By Public Utilities, Including Their Wholesale Rates And Tariffs

1. This Court's decisions have long recognized that FERC (and its predecessor, the Federal Power Commission) have "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982). The origins of that authority lie in the series of decisions leading up to *Public Utilities Commission* v. *Attleboro Steam & Electric*

Co., 273 U.S. 83 (1927), which held that the Commerce Clause precludes the States from regulating the wholesale sale of electricity in interstate commerce. Congress responded by enacting the Federal Power Act, "which denied state power to regulate a sale at wholesale to local distributing companies." *FPC* v. *Southern Cal. Edison*, 376 U.S. 205, 214 (1964) (internal quotation marks omitted). In enacting the FPA, Congress "meant to draw a bright line, easily ascertained, between state and federal jurisdiction, * * * by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Id.* at 215-216.

The Court has since recognized that Congress granted authority to the Commission beyond that necessary to close the "*Attleboro* gap." *New York* v. *FERC*, 535 U.S. 1, 21 (2002).[2] Further, the Court has consistently held to the view that the authority granted to FERC over interstate wholesale sales of electricity, filling the "*Attleboro* gap" and beyond, is exclusive and ousts state authority in that area completely. See, *e.g.*, *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986). In *Southern California Edison*, the Court rejected a claim that the permissibility of state regulation of wholesale sales of electricity turns on a case-by-case "analysis of the impact of state regulation of the sale upon the national interest in commerce." 376 U.S. at 210-211. Instead, the Court emphasized, the FPA "cut sharply and cleanly between sales for resale and direct

[2] Petitioner therefore errs in contending (Pet. 18) that "Congress intended to limit FERC's jurisdiction under the FPA only to matters beyond state control and preserved state regulatory authority." See *New York* v. *FERC*, 535 U.S. at 21 ("It is, however, perfectly clear that the original FPA did a good deal more than close the gap in state power identified in *Attleboro*. The FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been *previously subject* to state regulation.").

sales for consumptive uses," which "left *no power in the states to regulate licensees' sale for resale in interstate commerce*, while * * * establish[ing] federal jurisdiction over such sales." *Id.* at 214-215 (emphasis added). "FERC has exclusive authority to determine the reasonableness of wholesale rates," and "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable." *Mississippi Power & Light*, 487 U.S. at 371, 374.

2. If Congress acts in an area over which it has constitutional authority, "Congress may, if it chooses, take unto itself all regulatory authority * * *, share the task with the States, or adopt as federal policy the state scheme of regulation." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The clear import of this Court's holdings that FERC has exclusive jurisdiction over the interstate wholesale sale of electricity by public utilities is that, in this area, Congress has chosen the first alternative. Accordingly, any state law that would operate in that area, regardless of whether it would supplement or detract from federal law, is preempted.

Petitioner's state-law claims, if permitted to go forward, would assign a role to state law to govern the wholesale market in electricity in California. Under the FPA, electricity can be sold at wholesale by public utilities only under tariffs approved by FERC and conforming to the requirements FERC imposes. FERC exercised its authority to regulate the wholesale sale of electricity when it approved the umbrella market-based rate tariffs of individual public utility sellers, as well as the ISO and PX tariffs, which set forth the specific conditions of operation of the PX and ISO markets. A State may no more impose additional requirements on the operation of the market for wholesale electricity through its antitrust or unfair competition laws than it could set a "just and reasonable" price for wholesale sales of electricity in the first instance. Either type of determination

would be in the field reserved exclusively for FERC and prohibited to the States under the comprehensive regulatory framework of the FPA. Accordingly, the court of appeals correctly determined that petitioner's state-law claims, which are based on the proposition that a State *may* regulate the market for wholesale sales of electricity, are preempted.

3. Although the "field preemption" category best captures the basis for preemption of petitioner's state-law claims, the "filed rate" doctrine and conflict preemption principles also support that conclusion.

As the court of appeals recognized, petitioner's claims "ask the district court to determine the rates that 'would have been achieved in a competitive market.'" Pet. App. 10a (quoting complaint). Such a determination of fair rates under a state-law standard, however, would necessarily require the postulation of a rate different from that provided for under the tariffs approved by FERC. "[U]nder the filed rate doctrine, the Commission alone is empowered to make th[e] judgment" about the reasonableness of rates, and giving state law a role in that judgment "usurp[s] a function that Congress has assigned to a federal regulatory body." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 581-582 (1981); see *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-252 (1951) ("[T]he right to a reasonable rate is the right to the rate which the Commission files or fixes," and "except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in [their] opinion, it is the only or the more reasonable one.").

The application of conflict preemption principles leads to the same result. As the court of appeals explained in its earlier *Grays Harbor* decision, "by asking the court to set a fair price," petitioner "invok[es] a state rule * * * that would interfere with the method by which the federal statute was designed to reach its goals (specifically, FERC regulation of wholesale electricity rates)." 379 F.3d at 650. To permit petitioner "to receive in its

court action what is essentially a refund would create a conflict with FERC's authority over wholesale rates." *Ibid.* As the district court found (Pet. App. 32a), that point is illustrated by the potential conflicts between petitioner's action and FERC's currently active investigations and refund proceedings directed toward the very wholesale prices and alleged tariff violations on which petitioner relies.

4. Petitioner contends (Pet. 7, 18-20) that the filed rate doctrine does not preclude federal antitrust claims, and for that reason it should not preempt state antitrust claims either. That argument rests on the flawed premise that there is an identical standard for displacing federal and state antitrust laws. Unlike preemption of state law, however, "[r]epeals of the [federal] antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 (1963). Contrary to petitioner's unsupported assertion (Reply Br. 6), that stringent "plain repugnancy" standard does *not* govern the question whether a state law is preempted.

Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), illustrates the point. In *Square D*, this Court reaffirmed that, although the filed rate doctrine precludes private treble damage actions under the federal antitrust laws because damage awards in such suits would be inconsistent with that doctrine, "collective ratemaking activities are not immunized from antitrust scrutiny simply because they occur in a regulated industry," and such activities are subject to possible criminal enforcement or equitable relief. *Id.* at 421. *Square D*'s holding that the filed rate doctrine did not provide a complete immunity from federal antitrust law is of no assistance to petitioner, because the "plain repugnancy" standard that governs questions of immunity from the federal antitrust laws has no application to questions of preemption of state law. And *Square D*'s holding

that the filed rate doctrine precluded private treble damages actions even under federal antitrust law buttresses to the conclusion that petitioner's claims seeking similar damages under *state* law are precluded.[3]

5. a. Contrary to petitioner's contention (Pet. 24), the Ninth Circuit's decision in this case does not conflict with *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004). *Mirant* concerned the rejection in a federal bankruptcy proceeding of an executory contract for the purchase of power. The Fifth Circuit in *Mirant* noted that "FERC has the exclusive authority to determine wholesale rates." *Id.* at 519. Likewise, *Mirant* recognized that "the FPA would preempt any breach of contract claim where damages were sought because a lower rate would have been filed with FERC absent the breach," and would preempt "damage awards calculated using a rate other than the rate filed with FERC." *Ibid.* The court held only that rejection of an agreement in bankruptcy could be permitted where "rejection does not constitute a challenge to that agreement's filed rate," *ibid.*, as, for example, where the seller receives a secured claim against the bankruptcy estate in the amount of the electricity that "it would have otherwise sold * * * *at the filed rate*." *Id.* at 520

---

[3] For similar reasons, petitioner is wrong in contending (Reply Br. 5) that "the decision below maintains that the FPA preempts all competition laws" and thus conflicts with *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). See Pet. 18-20. As petitioner elsewhere acknowledges, *Otter Tail* concluded "that *federal* antitrust laws apply to the power industry notwithstanding the FPA." Pet. 18 (emphasis added). Petitioner, however, did not bring any *federal* antitrust claims in this case and, because petitioner apparently was not a direct purchaser from respondents, it would in any event have lacked standing to do so under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). Moreover, there was no conflict in *Otter Tail* between the authority of the Commission and the antitrust decree, because the Commission at that time was found to lack authority to regulate the subject of the antitrust action about which there was a live dispute—the refusal of a utility to "wheel" (*i.e.*, transmit) power from another utility to customers. See 410 U.S. at 375-376.

Mirant permitted rejection of a power contract only where the bankruptcy court would make use of— and in no way usurp— FERC's authority to determine a "just and reasonable" rate. Yet petitioner's state-law antitrust claims would thrust the district court into precisely such usurpation if and when the court attempted to determine damages for any state-law violation.

Moreover, *Mirant* involved the coexistence of *federal* bankruptcy laws with the *federal* FPA, not the preemption of state law. As noted, implied repeal of one federal statute by another "will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)). That is not the analysis that applies to preemption of state law. Accordingly, *Mirant*'s conclusion that the federal bankruptcy laws and the FPA may be construed harmoniously does not support petitioner's efforts to save state law from preemption here.

b. Petitioner also errs in contending (Reply Br. 6-7) that the decision in this case conflicts with *Florida Municipal Power Agency* v. *Florida Power & Light Co.*, 64 F.3d 614 (11th Cir. 1995). In that case, the plaintiff filed breach of contract and federal and state antitrust claims against Florida Power, based on its refusal to provide what the plaintiff termed "network service." Florida Power's existing tariff rate on file with FERC governed point-to-point service, but no separate rate was on file for network service. *Id.* at 616. The court of appeals remanded the case for a determination whether point-to-point and network services were sufficiently distinct products to require separate rates. If they were, the court of appeals held that the district court could "estimate the rate that would have been in effect but for the violation," because "[e]stimates are permissible and unavoidable in antitrust damage computations." *Id.* at 617.

Florida Municipal is not inconsistent with the decision in this case. In *Florida Municipal*, the court held that, if there were no tariff covering the sales at issue, the filed rate doctrine did not preclude the district court from making an estimate of the rates that would have been in effect absent the antitrust violation. In this case, by contrast, the court of appeals emphasized that "FERC approved tariffs [that] governed the California wholesale electricity markets," and that "if the prices in those markets were not just and reasonable or if the [respondents] sold electricity in violation of the filed tariffs, [petitioner's] only option is to seek a remedy before FERC." Pet. App. 11a. [4] The Eleventh Circuit's conclusion that in the absence of a filed tariff a district court may entertain an antitrust claim for damages does not conflict with the Ninth Circuit's conclusion in this case that where a tariff *does* govern the sales at issue, the district court may not entertain a state-law claim.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

---

[4] Although the plaintiff in *Florida Municipal* brought state contract and antitrust claims, as well as federal antitrust claims, the court's decision did not expressly address the possible preemption of the plaintiff's state contract claims at all. The court's holding that, if Florida Power "is not immune from antitrust liability," the district court may "estimate the rate * * * without infringing on FERC's jurisdiction," 64 F.3d at 617, plainly did concern the viability of the plaintiff's antitrust claims. But since those claims were brought under both state and federal law and were no doubt largely duplicative of each other, the court did not find it necessary to address any distinct questions concerning the possible preemption of the state antitrust claims. Accordingly, the court's conclusion is best seen as resting on the conclusion that plaintiff's federal antitrust claim is viable, not any holding on the possible preemption of state law. For that reason, too, *Florida Municipal* does not conflict with the Ninth Circuit's holding that state antitrust laws are preempted in this case.

PAUL D. CLEMENT
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General

CYNTHIA A. MARLETTE
General Counsel
DENNIS LANE
Solicitor
LONA T. PERRY
Attorney
Federal Energy Regulatory Commission

MAY 2005